UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TYLER BAKER, *et al.*, Plaintiffs, v. CAPITAL ONE FINANCIAL CORPORATION, *et al.*, Defendants.	Case 1:24-cv-1265 Alexandria, Virginia October 18, 2024 10:30 a.m. Pages 1 - 100

TRANSCRIPT OF DEFENDANTS' MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY

BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Civil Action 2024-1265, *Baker, et al. v. Capital One Financial Corporation, et al.*

Counsel, will you please note your appearances for the record.

MR. MORAN: Good morning. John Moran for Capital One joined by David Gelfand, also for Capital One.

MR. GELFAND: Good morning, Your Honor.

MR. WILLIAMSON: Good morning, Your Honor. Andrew Williamson with Bathaee Dunne with my colleagues Andrew Wolinsky and Yavar Bathaee. Yavar Bathaee will be arguing today.

THE COURT: All right. Welcome.

MR. MORAN: Your Honor, I'm also joined by Amanda Davidoff and Joseph Matelis on behalf of Discover.

THE COURT: All right. Welcome.

MR. MORAN: So, Your Honor, we're here on --

THE COURT: Hold on one second.

All right, Counsel.

MR. MORAN: Your Honor, we're here on defendants' joint motion to dismiss the complaint. With the Court's indulgence, defendants plan to have

Mr. Gelfand present argument on the ripeness issues and Ms. Davidoff present on the *Twombly* failure to state a claim issues.

THE COURT: That's fine.

MR. MORAN: Thank you.

THE COURT: All right. I've read the briefs. I'd be pleased to hear further from counsel.

Before we begin, what's the status of the regulatory review?

MR. GELFAND: There are regulatory reviews pending in front of the Federal Reserve, Office of the Comptroller of the Currency, and the Delaware agency.

THE COURT: Any sense of what the schedule of all of those is?

MR. GELFAND: We're hopeful that it will be soon, but it's impossible to predict. That's within their discretion and authority. There's also a Justice Department investigation.

THE COURT: Right.

MR. GELFAND: One point I want to make about that, Your Honor -- I think Your Honor knows this, but the pendency of these investigations should not be taken as an indication that there is any illegality about this merger or that there's a problem with the merger. This is routine in bank mergers and in many

other types of mergers that require regulatory approval. I just make that point so there's no inference from the pendency of the investigations that there might be some smoke there that gives credence to the plaintiffs' claims.

THE COURT: All right.

MR. GELFAND: Your Honor, I do have some prepared points I am ready to go through. I'm happy to, of course, address any questions Your Honor has.

THE COURT: All right.

MR. GELFAND: I'm going to start by saying something we said in our papers, Your Honor, which is this is truly an unprecedented attempt -- well, it's not an unprecedented attempt. But if the plaintiffs were successful in pursuing this case, it would be an unprecedented situation in my experience. I've been practicing in this field for many years. We've researched it. And as far as we can tell, there has never been allowed by a court a private litigation to proceed while regulatory approval is pending.

And there's good reason for that, Your Honor. The regulatory approval could result in the merger becoming moot, could result in conditions that change the outcome of the regulatory review, that change the circumstances under which the parties compete going

forward. And for that reason, courts that have been confronted with those few plaintiffs who have attempted to file a case pending regulatory review have found those claims to be non-ripe.

In one or two instances, there have been stays entered because the plaintiff would be prejudiced by an outright dismissal. The *Michigan National* case is an example of that that the plaintiffs have cited. I'll talk about that a little more in a minute.

But we are truly in uncharted territory here, Your Honor, if we go forward with a private litigation while the expert agencies and while the Justice Department is doing its important work.

Plaintiffs don't really engage on that case law that we've cited in the context of merger challenges other than to claim that the banking statutes create -- and it's a little unclear to me, but either circumstances or special rights that allow them to bring a case earlier than one would expect with a private litigation that follows on from a merger investigation.

Those laws say no such thing. This case is brought under Section 16 of the Clayton Act, 15 U.S.C. Section 2826. And that section says -- that's invoked in their complaint, Your Honor. That section of law

says that in antitrust cases, injunction proceedings are to be conducted as any other injunction proceeding heard by a court of equity. There's no special treatment for antitrust cases, and there's nothing in the banking statutes that are cited by plaintiffs that attempt to supersede that or override that.

And so, in our view -- and I'll go through some of the details -- the plaintiffs have brought an unripe case. It's unripe under the Constitution under Article III. It is premature under applicable law, and it is not entitled to some kind of special treatment because of the Bank Merger Act or the Bank Holding Company Act.

And I want to talk for a moment about the claim that plaintiffs will be prejudiced here by a dismissal. They will not. The prejudice that they have claimed, Your Honor, is that they will be forever barred from bringing their case if this case is dismissed. We do not believe -- that is not correct. Under the law, if and when the banking authorities approve this merger, there will be a mandatory waiting period after the approval. And that period will be at least 15 days under the law and could be as long as 30 days.

So plaintiffs can bring their case within

that period of time. And if they think they have a case at that point, based on whatever further developments have occurred -- and Your Honor can certainly hear them out at that time as to whether there should be some kind of preliminary injunction granted. We don't think they would have the grounds. They don't have an inherent right to stop every merger in its tracks just because they file a case.

But their claim of prejudice in their papers is that they will have no ability to file a case at all. They're trying to track the *Michigan National* holding, but it's just simply not correct that they will have no opportunity to bring that case. So we think the claim of prejudice is without merit.

THE COURT: Well, as a practical matter, what would be the difference in impact on defendants of process by simply a stay as opposed to a dismissal?

MR. GELFAND: I think both would probably come out in about the same place. We think those are the two alternatives before Your Honor. The *Michigan National* case really only considered those two alternatives. I think what the court there said was if there is going to be prejudice because of a dismissal, if that's going to put at risk the ability of the plaintiff -- there the Justice Department -- to bring

the case at all, then a stay is appropriate.

Now, those circumstances don't exist here, Your Honor. In our view, dismissal is appropriate. We just don't think the Court, with all due respect, Your Honor, has jurisdiction over this. It's premature. It does not satisfy the case or controversy requirement of Article III. But of course, I think as a practical matter, as long as the case is fully stayed and we don't have to be dealing with discovery and motions practice and constant attempts to distract us from the number one task at hand -- which is the work with the regulatory agencies and the Justice Department to figure out where this process is going to end up -- I think as a practical matter they're probably the same outcome.

THE COURT: All right.

MR. GELFAND: I know Your Honor is familiar with these principles. I'll be brief on the background. But the doctrine of ripeness arises from Article III's case or controversy requirement. We've cited case law on that. I don't think there's any dispute about that.

As the Supreme Court explained in *Renne v. Geary*, "We presume that federal courts lack jurisdiction unless the contrary appears affirmatively

from the record." It is the plaintiffs' burden to establish jurisdiction. It is not our burden to disprove it. And here, in our view, plaintiffs have failed to satisfy that burden because of the pendency of the three regulatory reviews that I mentioned, as well as the pendency of a Justice Department investigation.

The plaintiffs cite some statistics, Your Honor. I just want to talk about those briefly.

THE COURT: Yes.

MR. GELFAND: I think they're trying to persuade Your Honor that somehow these banking reviews are perfunctory, they're rubber stamps, it's definitely going to get approved. We think it's going to be approved. We're not arguing that our bank is unlawful and we'll be rejected. But if the plaintiffs are correct that there are serious antitrust issues here, those will be addressed by the banking authorities. And this is quite an involved procedure that the agencies go through. It's unusual in my experience.

The Justice Department performs an investigation. They're experts on the competition issues. They prepare a report for the banking authorities. The banking agencies are by law prohibited from approving a transaction if there's

going to be a substantial lessening of competition not outweighed by other factors under the applicable statute. And I think it's just without merit to say that this is a perfunctory or a rubber stamp exercise.

And in fact, the statistics themselves are misleading. Because in the banking field, what typically happens if the agencies identify a serious issue, they bring that to the party's attention. And it is pretty typical in those situations where a real issue has been identified.

Again, we don't think there is a real issue here, but where the real issue is identified, it's typical for parties to abandon the transaction before the fed or the Office of the Comptroller of the Currency has to render a decision.

So citing statistics saying that there's some kind of 20-year unbeaten streak with no transactions challenged for any reason is just not accurate. They just don't show up in the statistics because they're abandoned transactions.

And even if we're right that there's no issue here and that this ought to be approved, we don't know that, Your Honor. We don't know that it's going to be approved. So there is at least a possibility -- we think small, granted, but there is a possibility that

something will happen that causes this transaction not to move forward as a result of the regulatory process. But I want to put that aside. That is not our major argument.

Regardless of whether it gets approved, there is often conditions. There are often conditions imposed on mergers that get approved by the banking authorities and that go through DOJ review. And we cited several examples of that in our brief. A variety of conditions can be imposed. And once that happens, there is a new circumstance that could be presented to the Court. And it is a waste of time and premature for us to litigate about a merger when we don't know what the contours of that will be or what types of binding conditions might be imposed on the banks.

We've already offered one commitment. It's a community development plan. My client, Capital One, is very willing to agree to these kinds of conditions. It's ignored by the plaintiffs in their complaint, in their papers. I don't know if that matters to the competition issues. We haven't figured that out. But it's an example of the kinds of things that can happen as you go through this process.

And the courts have recognized this, that until that process plays out, we simply don't know what

we're going to be litigating here. And we cite *Trump v. New York*. That's a very recent case obviously, but this is a fundamental principle of constitutional law, that a claim is not ripe if it is, quote, dependent on contingent future events that may not occur as anticipated or indeed may not occur at all, end quote.

As I have said, it's rare for private parties to attempt to do what plaintiffs are doing here, but it has happened. On occasion we have cited that case law in our brief. The courts have consistently found that the claims are not ripe.

Here's one case, *DeMartini*, that we mentioned in the brief, but there the FTC review had been concluded and the defendant provided no evidence of a European review that they claimed created uncertainty. So the court rejected the claim there. But otherwise, every case that I'm aware of, that we were able to find in our research, where private plaintiffs have attempted to bring a claim while regulatory approval is pending have been dismissed for ripeness grounds, or *Michigan National* had that unusual circumstance where there was one approval and one pending. And that was the stayed case.

Illustrative is *South Austin Coalition Community Council v. SBC Communications*. It's a

Seventh Circuit opinion authored by Judge Easterbrook. That's the one I highlight here because I think the language in the opinion is very clear. It's really on all fours with our situation.

There you had two telecom companies merging. That was subject to review by the Federal Communications Commission comparable to the banking authorities here. It was also subject to review by two state regulatory agencies comparable to Delaware banking authority here. And a private action was brought while those reviews were pending. The case was dismissed as not ripe. It went up to the Seventh Circuit, and the Seventh Circuit easily found there on the facts there that the case was not ripe.

The opinion states at page 845, "Courts often wait for agencies, even when the agencies' views are not legally conclusive." We don't argue that the banking authorities are conclusive here. Your Honor will have an opportunity to review the evidence if a case is brought and it passes a motion to dismiss, etc. But even where not legally conclusive, "not only because the agencies may have something helpful to say, but also because what the agencies do may shape the litigation." Exactly the point I've made, Your Honor.

The opinion goes on to conclude, "Until the

agencies have had their say, it is impossible to perform the sort of antitrust analysis that is integral" to the antitrust theory. I put that in square brackets. There was a different antitrust theory there.

"And it therefore would be a waste of everyone's time to proceed. Antitrust litigation can be very costly; an expensive challenge to a moving target is worse than pointless."

And so that is one of the cases we rely on that plaintiffs don't really engage with.

I want to also make this point, and it goes to the ripeness. But the plaintiffs have kind of revealed how they view their role here as sort of another regulatory agency. And they're in effect asking the Court to become a parallel advisor to the regulatory agencies. Not in the papers on this motion, but in their opposition to our stay brief the plaintiffs say at page 10 of that opposition brief, "Anticompetitive harm shown in this case... may require a change to the transaction presented to regulators for approval."

They're reviewing that what they really want Your Honor to do is move along with this case so that the opinions that you render in the course of the case,

maybe even get to a final judgment before the agencies have even decided what to do, so that you can provide advisory opinions to the expert agencies that are reviewing the merger.

Your Honor, that is not the role of the federal courts. That is exactly a textbook example of asking the Court to do something that is not ripe before a final agency action has even occurred. I think that part of their opposition brief is telling in that regard, Your Honor.

Now, the plaintiffs have various responses to our arguments and, in our view, are all without merit. They say our arguments are radical and wrong. Our arguments are right in line with that Seventh Circuit opinion and all of the decisions that have dismissed merger challenges as being non-ripe.

And it's the plaintiffs really who are being radical and wrong here -- I wouldn't choose that word on my own, but since they're accusing us of that -- because they're asking the Court to do something that has to our knowledge never been done.

And one would expect them to have very, very strong support for that proposition. But, like I say, their entire argument is based on the two banking statutes at issue.

And if I read their argument correctly, Your Honor, I think what they're saying is these banking statutes express an interest in having a court perform an important role -- there's no question about that -- and that they create certain procedural hurdles for the plaintiffs to clear if they're going bring this case. But for the reasons I'm about to describe, I think both of those arguments are without merit.

I want to just back up for a minute. And I know the Court has had the benefit of some of the case law we've cited, but you can see the legislative history discussed in some of those cases. This act, the Bank Merger Act of 1966, was a response to a Supreme Court decision in *United States v. Philadelphia National Bank*, which had blocked a banking merger under circumstances that were somewhat controversial then.

The decision itself found that there was going to be an anticompetitive effect here and the court in that case had refused to consider benefits to other groups of customers over here. And many people thought that was a poor decision and bad public policy, and Congress reacted to that by passing the Bank Merger Act.

The important point that I'm trying to make, Your Honor, is that statute was intended to narrow the

ability of a plaintiff. And, honestly, all Congress was thinking about in 1966 was the Justice Department. I can't see any evidence anywhere that they were worried about or thinking about private plaintiffs.

But that entire opinion -- entire legislative history reveals an intent to rein in the ability of the Justice Department to block a bank merger after it has been approved by the expert agency. That's the policy that's reflected in that statute.

And it is inconceivable, Your Honor, that a statute that was intended to rein in the Justice Department and make it harder to challenge a merger would somehow simultaneously and in unspoken terms make it easier for private plaintiffs to bring cases early and override constitutional principles of ripeness, which Congress probably didn't have the authority to do anyway. So I just mention that as background.

But as I said, the case is brought under Section 16 of the Clayton Act. That law says that a plaintiff -- we don't dispute this -- has every right to file a lawsuit at the right time if they wish; that a plaintiff is allowed, quote, to sue for and have injunctive relief when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by

courts of equity.

Congress made clear that there was no special role for antitrust cases when bringing an injunction claim.

Now, the plaintiffs argue that the provision of Sections 1828, 1849 that says you can only bring a case if you bring it before X date -- and I'll come back to X date in a moment -- means that they can sue whenever they want. Presumably, they could have sued -- I don't know -- maybe while the deal was still under consideration before it was even agreed to. I don't know what the limiting principle for them is.

But that is not what the statute says. The statute works as, in effect, a very short-term statute of limitations. And in fact, that's the way Congress viewed what they were doing. We went back and looked at some of this legislative history that is cited in our -- well, that is discussed in the cases that we've cited. And one of the bill's sponsors, Representative Patman, called this a 30-day statute of limitations. That was the word that was used to describe it.

So Congress certainly didn't think it was allowing plaintiffs to bring cases earlier. And in fact, the very use of that term "30-day statute of limitations" suggests to me that the action would

accrue upon regulatory approval because that 30 days is pegged to the first date when an approved merger can close.

The statutes have a waiting period as I mentioned. After a regulatory approval, 15 to 30 days, and you have to bring the case within that time frame. I appreciate it's a short time frame, but everybody is going to know when this approval happens. That is going to be public. There's a suggestion in their papers it may be only the Justice Department will find out about it and the merger will close without any advanced warning. But these things are public when they happen.

And they will have an opportunity to come back before Your Honor once they look at the final version of this merger and ask you to do whatever they want to ask you to do at that point. They are not going to lose that opportunity. And their suggestion that this is the only way to pursue the case is to pursue it now is simply wrong.

So they're wrong on that end date point. That's an end date like a statute of limitations, not a change in the law as to when you can bring a claim and still claim that it's ripe.

They also make much of the fact that there's

going to be *de novo* review. That's in the statute. There's nothing particularly special about that. I've done a number of these merger litigations, Your Honor, where private parties came and challenged it after approval or after the regulatory process. And it is correct that Your Honor or whatever court they come before will have an opportunity to review the evidence and make your own determination about the legality of the merger.

The decision of the banking agency is not going to be binding on Your Honor at the time they bring that case. But *de novo* doesn't mean that their clients get to become a fourth or fifth banking regulator and be part of an investigative process. In fact, if Congress had intended that, they would have used a phrase like simultaneous review or maybe a priority review. But Congress said *de novo*. Afterwards you can make a new determination as to the legality of the merger.

And I'm sure Your Honor is familiar with *de novo* review and other circumstances. It's not something that happens simultaneously. It's not something that happens before. It's something that happens after, *de novo*, do it anew. So I don't think that that helps them at all.

The Supreme Court decision in *United States v. First National Bank of Houston* talks about this *de novo* standard. The court explains that it's simply a fresh look at the evidence. But importantly, the Supreme Court there said, actually, it is a good thing that the agencies resolve these matters through a regulatory process first because the court can benefit from that analysis said the Supreme Court in *First National Bank of Houston.* And in fact, maybe the circumstances will change, as the Seventh Circuit said in the *SBC Communications* case and you'll have new facts to review at that point.

So *de novo* doesn't give them some kind of special exalted place in the ecosystem of bank mergers where they get to be a fifth agency doing a simultaneous review. And in fact, the statutes themselves also talk about approved mergers. We've cited that language. And that suggests the statute was expecting mergers to be approved.

Now, *Michigan National* I've already mentioned. They rely very heavily on it. That case arose at the very unusual circumstance of one agency having approved it and one agency still being pending. And the Justice Department went in and sued in between and said to the court, "If we don't sue now, there is a

reading of these statutes that say we can never sue." And under those very unusual circumstances not present here, the court said, "Well, we don't want the government to forever lose its right to sue; therefore, we're going to enter the stay." There's no part of that opinion that I can find that says a third option might be to just let the case proceed. That entire decision is about do we dismiss for ripeness or do we stay.

And the stay happens because of all the reasons I've mentioned. There's a benefit to letting the regulatory process play out. The dismissal will happen if there is no showing of prejudice, which plaintiffs have not made here.

I think I've managed to cover all of my arguments, Your Honor. I guess I'll make one final point before I hand it over to Ms. Davidoff.

There's an unusual theory asserted here -- and I'll let Ms. Davidoff talk about the substance of the unaddressed theory that's asserted -- but it sort of makes this doubly unripe. And the reason it's doubly unripe is because what they're arguing in this complaint is that something is going to happen after this merger closes as a result of Capital One issuing Visa and Mastercard and also owning the Discover

network.

That act does not lessen competition on day one because there really isn't going to be a change in the structure of the market. Their argument is that, well, this is going to put Capital One in a position to do something untoward some day, maybe use this opportunity to somehow violate Section 1 of the Sherman Act and coordinate. That hasn't happened yet. And it's completely speculative and hypothetical. I'm sure Ms. Davidoff will talk to you about that. But that makes it doubly unripe.

And the one case that we cite on that is the *SureShot Golf Ventures v. Topgolf* from the Fifth Circuit.

So thank you very much, Your Honor.

And unless Your Honor has questions, I'll turn it over to my colleague.

THE COURT: Thank you.

MR. GELFAND: Thank you very much.

MS. DAVIDOFF: Good morning, Your Honor. Before I -- I'm Amanda Davidoff from Sullivan & Cromwell for Discover.

And before I begin, I wanted to -- we didn't check with Your Honor on whether you prefer to hear a response to the arguments --

THE COURT: I'll hear yours.

MS. DAVIDOFF: Thank you, Your Honor.

So I'm going to turn to why if the Court does not dismiss on ripeness grounds or standing grounds, it should dismiss on the merits.

Plaintiffs' burden here, as you know, was to plead plausible allegations that the merger violates Section 7 of the Clayton Act by substantially lessening competition and Section 1 of the Sherman Act because it's going to result in a contract that will unreasonably restrain trade. And they haven't done this.

So starting with Section 7, plaintiffs concede in their opposition that they have not alleged that the merger is going to materially increase concentration in either of the two markets that they pleaded in their complaint, and you can find that at pages 22 to 23 in their opposition brief.

The complaint actually alleges it's going to deconcentrate the market for payment networks making it less concentrated. That's at paragraphs 68 to 69 of their complaint and, you know, some of the paragraphs after that, including paragraph 73.

And for Section 1, they identified no restraint of trade in the vertical contracts by which

Capital One obtains payment network services from Visa and Mastercard which, again, plaintiffs concede are currently legal. They don't identify any way, based on the high-level of competition that now exists in the credit card market, that those contracts once Capital One and Discover are merged would impact competition in that market. They couldn't. Capital One only has 9 percent of the issuance. Discover only has 3 percent of the issuance according to the allegations in the complaint.

So without being able to allege that increase in concentration in either of their markets or any impact on competition, plaintiffs are just left with speculation about what's going to happen after the merger. And they're really implausible speculations.

The principal one -- and this is really their key argument -- is that after the merger, Visa and Mastercard through their agreements with Capital One as a credit card issuer may try to bribe Capital One to degrade the Discover network in exchange for getting better interchange fees from Visa and Mastercard. And then that Capital One might not pass on those savings to its customers. That's truly the theory that they're putting forward. *Twombly* says courts don't allow complaints to proceed based on that kind of

speculation.

I want to emphasize one more feature of this case that makes it a very straightforward one for dismissal, and that's that defendants are usually in a position of moving to dismiss on the basis that the market that the plaintiffs have alleged is implausible or the market shares that they've alleged are implausible. And the court has to do an analysis of whether, you know, the plausibility of the market: Are the products reasonably interchangeable, are they substitutable, or is the market itself not properly alleged. Your Honor doesn't have that situation.

Here, defendants for the purpose of a motion to dismiss are accepting the markets that the plaintiffs have alleged. These are their markets, the credit card market, the payment network market. We're accepting for the purposes of the motion to dismiss the market shares that the plaintiffs allege. So you don't have to wade into any of that.

The only thing Your Honor has to do is decide whether this situation where plaintiffs have alleged that the merger is going to substantially -- is going to decrease concentration in one of the markets and keep it materially the same in the other, whether they can also go forward with the Section 7 claim and

whether when -- we've got a contract in front of the court. The key contract, they say, violates Section 1 that is currently legal. And the only basis for this Section 1 claim is speculation about what might happen in the future. Your Honor just has to decide whether that set of allegations states a claim under the Clayton Act and the Sherman Act, and it doesn't.

So I would like to sort of dig a little more into the Section 7 allegations on concentration, if I may. The Fourth Circuit in *Steves* -- and this is like other circuits -- has explained that whether a merger unduly increases concentration is the touchstone of the Section 7 violation. The language from *Steves* is that the plaintiffs establish a presumption of anticompetitive effect by showing that the transaction is going to lead to undue concentration.

So what have plaintiffs pled about concentration? Well, in payment networks, the complaint alleges that Discover now has a 2.2 percent share and that Capital One is going to move some of its credit cards from Visa and Mastercard to Discover network after the merger.

What's that going to do? That's going to increase the 2.2 percent share of the payment network market that Discover now has. And again, that's at 68

and 69 of the complaint and 173.

Now, obviously, when Discover takes market share from Visa and Mastercard, that's going to make the payment network market less concentrated as the payment network market.

And the credit card market plaintiffs' claim -- and this is at page 41 of their complaint. It's a heading. The merger is going to increase market concentration in the general credit card market. That's their theory. The merger is going to increase concentration in that market.

But what are the facts alleged in their complaint? The facts alleged in their complaint say the exact opposite, that Capital One and Discover are going to merge, and they are among two of over 4,000 competitors in the credit card market. And when they combine, there's going to be a 76-point increase in the HHI, a 76-point increase.

Courts regularly have said, as we cited in our brief, that anything under 100 points is not even worth thinking about. And honestly, the threshold would have to be much, much higher for the courts to be concerned about competition.

When you look at the cases plaintiffs cited in their briefing, you don't really have to go any

further than *Steves*. The HHI increases that the courts have concerns about in those cases are in the range of 1,200 to 1,500 points, which is obviously very, very different than here.

Now, we pointed all this out in our brief, and plaintiffs' response was, well, whether a merger increases competition -- sorry. Whether a merger increases concentration doesn't really matter. You don't have to think about that, Your Honor, in assessing whether our claim and that claim survive. That's in their opposition brief at page 23.

That's wrong. Plaintiffs don't cite any case blocking a merger for any reason other than increased concentration. No court has ever found that a merger that decreases concentration in a market, like the payment network market here, that that kind of a merger is going to harm competition and blocked it on that basis. And no court has ever found a merger that combined two competitors in a 4,000-competitor market to be anticompetitive, much less with an HHI increase that's as small as the one plaintiffs allege here.

But equally important, you know, beyond the fact that they haven't alleged an increase in concentration in either of the markets and have alleged a decrease in concentration in one of them is the fact

that plaintiffs don't have any other theory that's plausible for why this merger would decrease competition.

And I just want to briefly look at the three points they make. There are, you know, three theories that they put forward in their opposition brief after essentially giving up their concentration base theory that had been in the complaint.

The first one is that the merger is going to eliminate Discover as a vertically integrated competitor. Obviously, when the Court looks at the complaint, you can see that there's no elimination of a vertically integrated issuer, and the complaint pleads that. There's no elimination of anything. The complaint pleads that Capital One is going to issue cards on the Discover network after the merger and that Capital One will be vertically integrated according to plaintiffs' own definition because they define vertically integrated as an issuer that need not split its interchange fees with the network. That's opposition page 19.

So, you know, we've got an assertion that there's going to be an elimination of Discover as a vertically integrated issuer, but the facts pled in the complaint say the exact opposite, that Capital One is

going to be the replacement vertically integrated issuer for Discover.

Now, accepting plaintiffs' allegation that vertically integrated issuers enhance competition strengthening one of the two vertically integrated issuers that's now in the market -- and Discover being the smallest -- is going to enhance competition. It's going to be good for competition, and that's really what the facts of the complaint say.

Plaintiffs' second argument is that the merger will strengthen the -- and I have to read this because I want to make sure I get the phrase right -- strengthen the payment network and issuer rewards barrier to entry for the PNIRBE, P-N-I-R-B-E. One of the places that's pointed out is in the complaint at page 39. This is actually a term that plaintiffs coined to refer to barriers to entry. It exists nowhere in the industry or in the economic literature.

So let's talk about barriers to entry. The complaint does not plead any plausible barrier to entry -- to entering into the credit card market. There are 4000 credit card issuers, and under those circumstances, it really would be impossible to plead a barrier to entry.

But as for payment networks, it's a little

more complicated. The complaint doesn't plausibly plead that any barrier would be strengthened by the merger. So let's talk about that. According to the complaint, the barriers to entering the payment network market exist because of network effects, because merchants and credit card holders are reluctant to adopt a new payment network until there's a critical mass of others on that network. That's their allegation of what the barriers to entry are based on these network effects. That's at paragraph 165 of their complaint.

The problem with this theory that the PNIRBE for the barriers to entry are going to be increased by the merger is that there's no pleading of how these network effects are going to be increased by the merger. They exist before the merger. They exist after the merger. There's no -- there's no strengthening of the barriers to entry.

If anything, what the complaint pleads is that the barriers to entry are going to be reduced by the merger. And that's because the merger, again, according to the complaint, is going to strengthen the Discover network. Capital One is going to move volume from Visa and Mastercard to Discover, and that's going to reduce the Visa and Mastercard dominance.

Actually, at paragraph 176 of the complaint, plaintiffs allege that the way to reduce barriers to entry in the payment network market is through having a vertically integrated payment network market entrant, that that would disrupt the barriers to entry.

But here, what they're pleading is that one of the payment networks already in the market is going to become stronger as a result of the merger. Well, that's the same thing. It's going to disrupt those barriers to entry, if anything.

So we can put aside those two theories for how the merger is going to harm competition. The idea that we've lost a vertically integrated competitor or the idea that there will be barriers to entering the payment network market are going to be strengthened. Both of those are not plausibly pled in the complaint.

And we come to the main point that plaintiffs are trying make, which is that the merger is going to facilitate horizontal collusion in the payment network market. That claim of potential collusion -- and Mr. Gelfand stole my thunder for a little bit -- is pure speculation.

The key paragraph here is paragraph 203 of the complaint, and the theory there -- it's a little convoluted -- is that Visa and Mastercard might bribe

Capital One with higher interchange fees in exchange for not growing the Discover network even though the complaint says Capital One plans to do the exact opposite, grow this, what it calls a rare and valuable asset.

And part of plaintiffs' theory here is that Capital One might not pass on to customers those higher interchange fees that it gets from this hypothetical bribe because there's less competition from Discover cards. And they're making this assertion even though they allege in the complaint Discover only has 3 percent of the issuance market and even though the complaint says that issuers do pass interchange fees on to customers through awards and in other ways.

So under *Twombly*, the Court really can't accept these conclusory allegations of conspiracy that are, you know, just totally speculative.

And it goes -- it gets even worse because the claims of collusion are actually refuted by the complaint. There's an allegation in paragraph 59 that it is because of the large market concentration in the payment network market that Visa and Mastercard have large incentives to collude. But again, the complaint is alleging that the merger network is going to reduce concentration in the payment network market when

Capital One shifts volume from Visa and Mastercard to the Discover network.

So, according to the compliant, the factual allegations in the complaint as opposed to these sort of conclusory speculations, the merger reduces incentives to collude.

I have to address this supposed past collusion between Visa and Mastercard that comes up in a few places in the complaint. The idea is that there's been collusion in the past between Visa and Mastercard and Capital One to fix interchange fees. That's an assertion at paragraph 55 of the complaint.

And so collusion is likely in the future. That allegation does not hold up. We are -- the complaint is talking about a lawsuit from 2005 against Visa, Mastercard, and numerous issuers. And the only thing the plaintiffs in that case alleged about Capital One was that it had a representative on the Mastercard board of directors at the same time it was an issuing and acquiring bank. It has -- you know, that position on Mastercard's board of directors for Capital One had nothing to do with the claims here, the idea of collusion arising from an issuer payment network agreement to distribute payment network services. And that case also settled without any admissions of

liability.

So at bottom, Your Honor, there's nothing suspicious about selling one's own products, Capital One selling the Discover network, as well as those of the competitor, the payment network services of Visa and Mastercard. It's a necessary part of the dual distribution arrangements that we all recognize are common in the economy and that the Fourth Circuit said in *Brewbaker* are common in the economy.

It's the example like Footlocker selling Footlocker branded material and key branded material. It's an example like Harris Teeter selling Harris Teeter Old Fashioned Oatmeal and Quaker Oats. It's something we see every day.

Market participants regularly distribute competitor's products, and there's no case finding that this creates enough incentive to collude that there could ever be an antitrust claim based upon that.

I do want to briefly address the Section 1 theory as well, Your Honor. For the Section 1 claim -- and I went over it earlier, so I won't spend too much time on it. But plaintiffs asserted that the existing vertical arrangements between Capital One as issuer and Visa/Mastercard as payment network could be transformed into a legal agreement once Capital One is a horizontal

competitor to Visa and Mastercard in the payment network market.

And to be clear, plaintiffs agree these are legal now. They talk about them at paragraph 206 of their complaint. No suggestion of illegality. So it's just a suggestion that automatically upon the merger they become illegal.

Plaintiffs cite no court decision that even hints a merger could be illegal on the ground that it could transform an otherwise legal contractual arrangement into one that is illegal. So again, they're asking the Court to do something that no other court has ever done.

We can very quickly, I think, dispense with the idea of applying the *per se* rule to these allegations. *Per se* only applies to the types of arrangements that always or almost always hurt competition. Those are things courts know well, like price-fixing, market allegation, bid rigging. This is not one of those cases. This is a vertical agreement to supply payment network services.

The Fourth Circuit actually held in *Brewbaker* that it was legal error to apply the *per se* rule to a single agreement between parties related both vertically and horizontally. It was legal error. And

there the agreement was a little different. It was an agreement to do horizontal bid rigging. And the court said because there was a vertical aspect to the agreement, it was error to treat it as a *per se* violation.

Obviously, we're talking about nothing close to bid rigging here. We're talking about legal agreements to distribute services. So I think the Fourth Circuit would have a very negative reaction to the idea of applying the *per se* rule here.

So we are under the rule of reason analysis. To plead a rule of reason claim, plaintiffs have to allege a contract that unreasonably restrains trade. That means pleading significant and likely anticompetitive effect from the agreements based on market power and market share that Capital One would have in the credit card market after the merger. And that standard is set out in *Dickson v. Microsoft*, another Fourth Circuit case. This one is from 2002.

There's no significant and likely anticompetitive effect of these agreements. They're just legal distribution agreements of network services. But even if there were, there's no showing of market power that Capital One after the merger would have enough market power in credit cards sufficient to have

an anticompetitive effect.

We know from the complaint that plaintiffs allege Capital One after the merger is going to have about 13 percent of the credit card market. Courts have said that. That's not market power. It's way below the threshold for market power. And without that, plaintiffs aren't able to allege that this singular contract or these singular contracts between Capital One on the one hand and Visa and Mastercard on the other hand are going to affect competition in the credit card market.

Again, that's very like the *Dixon* case. There it was contrast between Microsoft on the one hand and Compaq and Dell on the other. Obviously, Microsoft had market power. But because Compaq and Dell did not have -- or weren't alleged to have market power in the PC distribution market, the court held that the Section 1 claim had to be dismissed on its face because there was no way that a contract Microsoft had with Compaq or a contract that Microsoft had with Dell could impact competition in the PC market where those entities didn't have any ability to affect competition because they didn't have market power.

Briefly on injunctive relief, Your Honor. To plead that claim, the plaintiffs had to plead a

significant threat of irreparable antitrust injury. They don't. Their principal theory is money damages. That's not irreparable. And all they identified beyond money damages, as Mr. Gelfand said, is just supposed loss for a right to bring an antitrust claim. They're wrong about that. There's no loss of that right. But even if they were right, that wouldn't be an antirust injury sufficient to constitute irreparable harm on any interest case.

So just to sum up, Your Honor, the Court should look beyond the buzz words and the jargon in the complaint and go straight to the allegations. The allegations are that concentration is going to stay about the same in one of the markets, credit cards. It's going to decrease in the other one, payment networks. And there's nothing beyond those concentration allegations other than speculation.

The Court can credit Clayton Act and Sherman Act claims based on the kind of speculation that's been put forth here, and the complaint should be dismissed.

Thank you.

THE COURT: All right. Thank you.

MR. BATHAEE: Good morning, Your Honor.

THE COURT: Good morning.

MR. BATHAEE: May it please the Court.

Would the Court prefer I start with the Article III or the merits?

THE COURT: Yes, Article III.

MR. BATHAEE: Your Honor, I do want to note something very interesting. Your Honor heard about legislative history from one senator, and I can talk about some of the others. The Court heard about some opinions about memoirs from private practice, but not once did we hear the text of the actual statute at issue, which is very clear. It says if you sue prior to the period set forth in the statute, you're okay. But if you sue after, you're barred. You're barred forevermore from bringing any claim having to do with the merger.

And in fact --

THE COURT: Is there a case that you could cite to the Court that would allow the antitrust challenge to go forward under these circumstances before a regulatory filing, a regulatory review?

MR. BATHAEE: Well, yes, Your Honor. The *Michigan* case itself from the United States Supreme Court --

THE COURT: Well, that was stayed, though.

MR. BATHAEE: They did stay that, Your Honor.

THE COURT: That's what I'm talking about.

MR. BATHAEE: Oh, Your Honor is not addressing Article III but a discretionary stay?

THE COURT: Yes.

MR. BATHAEE: Premerger challenges happen all the time. They're often coordinated. They usually involve the DOJ. We're in sort of in an unprecedented situation where it's a bank. And the statute is different. And the Court has a more robust role as sort of the final regulator on the merger itself.

And there was a lot of discussion about *de novo* review. It's not *de novo* review of the agency action. It's actually *de novo* review of the merger. So in a sense, this Court is the final regulator as to this merger. And that comes straight from *United States v. First National Bank of Houston*.

THE COURT: I understand that. But the issue is when should that take place, if ever? Should it take place in advance? Is there any instance where it's taken place in advance of the final regulatory process?

MR. BATHAEE: No, Your Honor, I am not aware of any instance of such a challenge to begin with --

THE COURT: Right.

MR. BATHAEE: -- other than the DOJ actions in the *Michigan* case and the *First National Bank*.

THE COURT: All right.

MR. BATHAEE: The issue is easily resolved, though, Your Honor, by scheduling a trial date that's after consummation, which sounds imminent from what we heard from opposing counsel. Anytime soon, nothing out of the ordinary. If it's imminent and it's anytime soon and nothing out of the ordinary, let us do our discovery -- and Your Honor has sort of balanced the discovery already -- and move along. And then it will consummate.

And if it doesn't consummate, then we're on the precipice of a trial, then, Your Honor, yes, of course, we should stay. I think we should wait until we have everything done and the merger has been approved.

But it doesn't mean the case has to be dismissed. I think that has been expressly rejected by the Supreme Court. The case or controversy issue -- and it's binding on this Court -- was decided in Michigan law expressly. So there is no Article III issue with respect to the suit being too early.

We heard the argument that, well, could they have brought it when they were just thinking about the merger? Well, of course not. But they did announce a merger. They're going through the process of finishing

it. They're almost done with it.

I think, you know, if we do comply with the statute, that's enough for ripeness. And we don't really need to go to ripeness principles to get there. We already have a ruling from the Supreme Court. But if we did and if we go to the *Trump v. New York* case, for example, very easily distinguishable. For one, that was a challenge to the executive action.

And on top of that, Your Honor, the injunction the district court had issued barred a cabinet member from making a report with the President of the United States on an issue that hadn't even -- on something that hadn't even been done by the President.

This isn't a challenge, Your Honor, for the Federal Reserve. It's not a challenge to the action by the OCC or a Delaware regulator. This is an independent claim under Title 15 under the antitrust laws.

And Your Honor heard my friend in argument say, well, there's nothing in the statute on this point that would allow a private antitrust case to go forward, but the text of the statute actually says antitrust. It says any action brought under the antitrust laws arising out of a merger shall be commenced prior to, and then it goes on. That's at 12

U.S.C. 1828(c)(7)(A).

The term "antitrust action," any antitrust action refers back to the word "antitrust action" in the same statute, which refers to just anything under Title 15. Our cause of action arise under Title 15. They don't arise under the Bank Merger Act or the Bank Holding Act. Those are defenses that they are given under those statutes that modify the rule of reason.

THE COURT: All right.

MR. BATHAEE: But the point, Your Honor, is that it says any action brought under the antitrust laws. That includes a private action. That's what the statute says.

Now, in terms of the stay, Your Honor --

THE COURT: Let's stay with Article III for a second.

MR. BATHAEE: All right.

THE COURT: What have you alleged that plausibly alleges injury in fact? What have you alleged that it's particularized, concrete, and actual as opposed to hypothetical or conjecture?

MR. BATHAEE: Your Honor, it would be increase in prices essentially. Decrease in rewards obtained if the merger is consummated.

THE COURT: How is that particularized,

concrete, and actual based on the facts you allege?

MR. BATHAEE: Well, the complaint alleges, Your Honor, that -- well, I can give the merits. I mean, that's very complicated how that actually works. But money damages generally are not available here, right, Your Honor. All we can do is, you know, we can eliminate the potential of them happening through an injunctive relief. Because once the merger consummates, the claim goes poof, and there's -- there's no availability of monetary damages.

But not only -- in that sense, it's irreparable because we can't -- we can't because of the statutory bar sue for damages after the merger is done. We can't come back and say, well, now that our prices have gone up because the rewards have dropped or interest rates have increased on the cards, for example, please pay us that difference. It's unavailable.

Now, if they independently do something anticompetitive after the merger, my friend is correct. That would still be available to us as a separate antitrust claim. But the merger claim itself, unlike a typical merger claim like the one in the Eastern District of Texas against *Schwab-TD Ameritrade*, that's a postmerger claim or even *Steves & Sons*, which is a

postmerger claim.

You would have Section 4 of the Clayton Act available to you for damages. You don't have that here. The claim is completely gone. There are no -- in fact, I think it says there's not even any judicial review. It says here the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than Section 2 of Title 15. That is monopolization.

So the injury we have is the irreparable harm of preventing the increased prices, loss of consumer choice, the strengthenings of -- threats of strengthening barrier entry that causes the increased prices longterm, and the structural change to the market. That is the quintessential Article III injury for antitrust cases.

THE COURT: Well, it sounds as if you're saying that because there's a potential for future injury you have standing now to attack the merger because it has the potential for later inflicting injury that would otherwise be non-addressable.

MR. BATHAEE: That's correct, Your Honor.

THE COURT: I'm not sure that satisfies the injury in fact.

MR. BATHAEE: Well, Your Honor, Section -- so Title 15's injunctive relief provision is perspectively worded. It's designed to, in fact, stop things before they happen. If that is a definition of what's required for injury in fact, you could never have a perspective premerger challenge.

There are additional facts that make it not speculative, Your Honor, because the CEO himself has said precisely what he plans to do postmerger. And I can get done with the merits.

So we have their actually expressed plan stated in investor calls which, as Your Honor knows, would subject them to lawsuits under the securities laws if they lied during them, right. So it's very clear that they're going to maintain this sort of mixed model, that they're going to change the structure of the market, and they're going to have these Section 1 agreements going forward.

So if the merger closes, that's the plan of the company. If that's the plan of the company, this is our only ability to -- the only ability to challenge those increased -- likely increasing prices, decreased rewards, and other market effects, including strengthening with the barrier entry. That time is now, and there's no other way to do that. And it's --

it's gone once the merger is consummated. We would have no ability to challenge that merger in any judicial proceedings in this country.

THE COURT: All right.

MR. BATHAEE: Your Honor, the other point I wanted to make is -- we hear this argument that, well, we don't know what the Federal Reserve is going to do. And so because there might be a difference in what the Federal Reserve approves and what they've asked for, that means that there is no constitutional case or controversy yet. Your Honor, that actually doesn't comport with the *Department of Commerce v. New York* decision in 2019 by the U.S. Supreme Court, which was actually cited recently in the *Murthy v. Missouri* case by the Supreme Court.

The question when talking about a third party and what they're likely to do is not about speculation. The Court won't engage in that speculation. It asks -- and I'll read from the *Department of Commence* case itself: "But we are satisfied that, in these circumstances" --

Let me step back. The question is whether the third parties will likely react in predictable ways. That's the standard. What's more predictable than an agency that has let 4,000 mergers go forward

without a squeak? And in fact, Your Honor, we heard something about, well, some of them aren't consummated. The statistics Your Honor heard take that into account. That's -- very few of them are stopped. I mean, essentially we consider that a block. So when we're talking 4,000 mergers, we're talking about the bulk of the ones the Federal Reserve has reviewed.

We've heard there's nothing wrong with the merger, that it looks like it's going to go through God willingly, as he said. We heard that there's nothing -- there's nothing anticompetitive about it in their view. And this is totally normal. There's no reason for the Court to think that, you know, the Federal Reserve is doing anything out of the ordinary.

So when you put all that together, it's actually quite speculative to say that the Federal Reserve is now going to block this merger or change it drastically after it has already posted its notice and comment period. It's over. It's made requests to them already. There's been an interplay. It's all published.

You haven't heard one word about anything that seems to be in flux or is changing from my opposing counsel. If anything, they're speculating about what the Federal Reserve, a third party, is going

to do in saying this Court can't then review this case, which is an independent cause of action having nothing to do with the Federal Reserve.

And so, Your Honor, I don't think we need to divine what the standard is because there is already binding precedent on the case or controversy question by the U.S. Supreme Court as to these statutes. But even if we did, you can't look to *Trump v. New York* challenging executive action that hasn't happened yet. And you certainly can't ignore the *Department of Commerce* which says you look at whether a third party is going to act in predictable ways. And when you put those principles together, this is plainly within the ripeness and traceability standard under Article III.

Your Honor, a few points. I heard repeatedly that there's no final agency action. And, Your Honor, this isn't an APA challenge. These are independent statutory antitrust claims. They are not challenges to any final agency action. And this Court, as Your Honor knows, will conduct a *de novo* review of the merger, not the Federal Reserve, under 12 U.S.C. 1828(c)(7).

In *First National Bank*, the court said, look -- and this is at 386 U.S. 358 -- sorry, 361. "The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the

Court's judgment, not the Comptroller's, that finally determines whether the merger is legal."

And so, Your Honor, it's not asking this Court to be an advisor with the agencies. The statute says that this Court is the final arbiter of the merger.

Now, should discovery proceed pending a likely trial where this Court finally decides the question? I think that it should, Your Honor. Should it be measured? Why not? Your Honor has already done that. Should we have a final order? As a matter of discretion, I don't think so. I think this Court can stay a trial, if necessary. I think by the time it's January when this trial is set or the pretrial hearing is set, this merger is consummated. And there's been not a shred of evidence that it's not likely to be.

So this is mostly a docket and case management issue. I don't -- it's certainly not an Article III issue. Generally, increased prices, loss of consumer choice, strengthening the barrier of entry that will hurt consumers are quintessential Article III injuries. That's generally not the issue, right, Your Honor?

The question simply is should this Court get ahead of the consummation of the merger? That can be

fixed just fine with a one- or two-month trial date change, or Your Honor can -- we're probably not going to move for summary judgment. But assuming we don't and they do, you know, I don't even think that would affect anything, right, because it would be against our plaintiffs.

So, again, Your Honor can balance that when we get there in January. So far we're still waiting on getting just basic discovery, basic document discovery. We're not even there yet.

So a lot of this is not something that this Court, you know, has to decide in the binary sense. We'll have a stay until, you know, we hear back from the regulators. The regulators are likely approving this. Everyone agrees. And it's speculative to say they're not.

Well, let's continue with the case, and if we get to a point where this Court gets ahead of the consummation of the merger, well, Your Honor, we would be the first to say pause at least some of it or at least the trial so there's no final order on the question.

Your Honor, I heard that this was a statute of limitations in the statute, a 30-day statute of limitations. And I want to address that point. It is

no such thing, Your Honor. The text of the statute does not prescribe a window. It has a prior to date. And the word "might" appears, might be consummated. So it's clearly not -- it's not saying after it's consummated. The word "might" appears in the statute itself.

So if we look at these words together, I don't think it's a reasonable reading to say that the statute has prescribed some kind of window, some kind of 30-day statute of limitations. It is in a sense a statute of limitations because if you sue after that point, your claim is barred even if you're the Department of Justice.

The third thing is an early warning period to the DOJ, which is involved in the merger review. So it's not a surprise to them. It just gives them time to file their suit. If they're preparing one anyway, they would have, right. That's for the DOJ.

The 30-day period once lapsed -- the earliest period actually, it's not just the 30-day period. But the earliest period under which the transaction might be consummated and lapses, you can't sue anymore, and your claims are forever barred.

And I just read the very stern language in the statute about any kind of judicial review with a

merger ever again being barred. And that's because if Your Honor does look at the legislative history, it's because you can't unscramble all of the stuff that happens after a bank merges. Banks are unique in that sense.

And that's actually recognized all over the *United States v. First National Bank of Houston* case. And, in fact, 370 to 71 the -- in fact, it explains why the regulators stayed pending a judicial review at this point. It says, "The normal procedure therefore should be maintenance of the *status quo* until the antitrust litigation has run its course, lest consummation take place and the unscrambling process that Congress abhorred in the case of banks be necessary."

This is the important forum for this bank's merger, not the Federal Reserve, not the OCC. They have to wait. They don't get to approve anything until this Court decides. It is 180 degrees in reverse.

Now, is it good sense not to get ahead of their approval with a trial? Sure. And I think we should get there when we get there. We're not there yet. We're a few months probably from this thing consummating in my opinion. I've looked at other bank mergers. I've looked at where they are in the process. You're not getting much information from them other

than everything looks good, which I think probably means it's getting consummated soon.

So there's nothing that can't be fixed with just a little bit of scheduling. And I think something as drastic as dismissing our case and having me refresh the Federal Reserve cite until they approve and then filing another lawsuit, I mean that doesn't sound right.

And it certainly doesn't sound right -- and we get no discovery until 30 days before consummation, and then we have to rush to a trial? I think all of that seems the opposite of judicial efficiency. There are much less prophylactic ways to deal with that sort of thing.

So anyway, that -- that's my point on the Article III and on the stay issue.

As to courts never allow, I think my friend in argument must have misspoken because there have been lots of premerger challenges in the United States. I mean, there was a recent airline one in the news. Premerger challenges are quite common. I think my friend in argument means he hasn't seen a bank merger challenge, and I think he's correct about that. This is an unprecedented situation. In fact, the very statute Your Honor is looking at, the prior to language

hasn't been interpreted for, you know, 50 or 60 years. So that doesn't mean there's no right to. It just means it hasn't been done before.

And this is an important merger. This may be the rare case where, yes, a private plaintiff -- people who have credit cards who, frankly, with the highest interest rates in the country, they might care. They might want to enforce the community effect standard that's incorporated into the statute that offsets and changes the rule of reason under Section 7.

This might be the situation where the individual consumer is uniquely affected, and a regulator is not the appropriate person to sign off with finality. Perhaps a private plaintiff does need to bring a matter to court, and the Court needs to look at it independently. And Congress provided for that.

It may be the first time someone has done it, but it's not wrong. It's not unauthorized. It's in the statute.

So, Your Honor, I do want to make the point that I understand my friend's arguments. I do want to stress that it's important we start with the statute itself, not some legislative history. In fact, Your Honor, the very legislative history cited had one senator who wanted to bar all challenges from the

antitrust laws to mergers entirely. And it goes on and on for pages. I don't have them with me.

Should we take his view? Which senator do we choose? I think the right view is to look at the statute. Did Congress enact a window? Well, does the statute say window? Does the statute say in between these dates? It says prior to. So, does it say it must be consummated? It says might be consummated.

Well, the best evidence for what these people thought when they passed the statute is the text of the statute itself. And so I respectfully ask that the Court reject a lot of that argument because it doesn't -- it doesn't comport with how we can objectively interpret these laws, which have not been interpreted before, which are being interpreted probably for the first time by this Court in this context.

Your Honor, on the Article III thing, unless Your Honor has any questions, I think that's my argument.

Your Honor, on the rule of reason point -- well, let me back up. I think it's important to start with the rule of reason, and the reason it's important to start with the rule of reason is, I think, it disposes of this motion to dismiss very quickly. The

rule of reason is an inherently factual analysis. It is not one that can be telesmatically disposed of as a matter of law by looking at some market shares.

In fact, there are countless cases warning against doing precisely that. Most recently, Your Honor, the Fourth Circuit in *Duke Energy* just months ago reversed a summary judgment decision in a Section 2 case, which is a modified rule of reason analysis. And there the court said, well, there's predatory pricing. So let's apply the *Brooke Group* test. And there's a refusal to deal. So let's apply the *Aspen Skiing* scheme test. And the court said, no, you can't do that. You have to look at all the conduct as a whole, the market structure, and determine its affect.

And, Your Honor, I can just read, you know, some select points from that. This is at *Duke Energy*, 111 F.4th 337: "When a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within preestablished categories, its application of such specific conduct tests would prove too rigid."

"Thus, when a plaintiff alleges that a scheme or course of conduct was anticompetitive, the scheme or conduct must be considered as alleged, not in manufactured subcategories."

And they quote Justice Holmes in a Section 1 case, and they say this applies to Section 1 and Section 2 cases. There's no reason it doesn't apply to Section 7 rule of reason cases too, right. It's the same principle.

The plan sometimes make the parts unlawful. That's from Justice Holmes.

The plan we have -- and Your Honor didn't hear my friend, Ms. Davidoff, mention the CEO's plans which are expressly stated in the complaint. He says exactly what he's going to do. Nothing speculative about it. And perhaps right now those contracts are unlawful, but in the market structure postmerger, they may not be.

And that is not something, Your Honor, that can be decided just by looking at some Herfindahls and saying, Get off my lawn. This is a totally great merger. Leave.

That's not what the rule of reason is. The rule of reason is probably the most factual inquiry, I think, a court can possibly engage in next to causation, namely, next to proximate causation.

And, Your Honor, in *Robertson v. Sea Pines Real Estate* -- this is the Fourth Circuit -- the court rejected it. It's the same kind of attempt. 679 F.3d

at 291. "We cannot know at this early stage" -- and this was a motion to dismiss -- "whether plaintiffs will ultimately prevail. Whether defendants' conduct indeed violated the Sherman Act is a question to be answered on remand."

Your Honor recognizes the same point in *Lumber Liquidators* at 415 F. Supp. 711. And, Your Honor -- and I'll get to the actually details here and why this does allege a rule of reason claim with granularity. It's not nearly as dire as my friends say. It's actually quite the opposite.

But, Your Honor, in -- until 2012, in *Robertson v. Sea Pines*, the Court explained the things it looks at, and they're all factual. Does it raise barriers to entry? Does it raise prices? Does it stabilize the market in an anticompetitive way? Does it discourage entry?

These are all perspective by the way questions that this Court must evaluate and not in a vacuum. As this Court -- as the Supreme Court said in *Continental/Orr* -- and I think it was repeated in the *Robertson* case and recently in the *Duke Energy* case -- all the agreements need to be considered as a whole. That means all of the agreements that we've seen -- that we allege are going to continue past the merger

and be created after the merger, right. Because we have to look at their plans. They have to be considered as a whole, and they need to be considered as whole with all of the conduct that we allege. And I'll get to that when I get to the rule of reason point.

All of that's considered as a whole in the aggregate. It is not to be compartmentalized wiping the slate clean and then -- and that's been the rule for the rule of reason since *Continental/Orr* and certainly followed by the Fourth Circuit as recently as a few months ago.

And so how can it be? How can it be that we can take all of this conduct as a whole, all of it, jumble it together, and then look at the market share or a Herf and say, oh, you failed the rule of reason as a matter of law? Incredibly unlikely.

And so I -- and I'll get to why it's not -- I think it's probably inviting legal error. But I do think the point here is, Your Honor, even if we get to the rule of reason under Section 1, we still have a rule of reason case under Section 7. Together we're going to get to the rule of reason and the factual issues are so, so complicated, and there are so many pieces to it that a dismissal would be, I think, a

mistake.

Your Honor, as to what the complaint says, it alleges all the hallmarks that the *Robertson* case set forth. It strengthens barriers to entry. And if Your Honor looks at paragraphs 165 to 183, it pleads the strengthening to barrier entry in several ways. It reduces price pressure from a vertically integrated competitor.

Now, this is very important. My friend in argument made the point, well, Discover is sticking around. In fact, Capital One is going to continue maintaining Discover. What's going to change? The competitive pressure changes. When you have a vertical -- vertically integrated competitor, they don't split the interchange fees with an issuer. That means they keep all of it.

And as Your Honor knows and it says in the complaint, all of that is then as a matter of accounting used to fund rewards. They're coupled. That's where the rewards come from. And when you don't split any money with the issuer and you don't have to haggle with an issuer to split, you can remit more rewards, which essentially is price pressure in the credit card market. That comes from having independent vertically integrated network -- network and issuer,

like Discover and American Express.

If Capital One is operating it, where is the price pressure? They're going to -- what are they going to do? They're going to keep -- they're going to keep the entire interchange fee for all of those Discover cards, and that's going to make them want to lower their capital -- increase the Capital One rewards why? They own it. It's not their competitor anymore. They keep all the money. Well, why would there be any competitive pressure?

So, yes, this is exactly why the statistics are entirely misleading if you just look at market shares and Herfindahls. Because the competitive effect comes from the independence of the vertically integrated credit card company.

After the merger, all that's left is AmEx. And so you are -- in order for a new entrant to come in, they would have to vertically integrate, which then runs them right into that feedback loop that the very CEO of the company of Capital One says exists.

Now, I heard a little bit of flack for the PNIRBE, which I think Ms. Davidoff did a much nicer job pronouncing it than I. I was going to say Peneer (phonetic), which is terrible. PNIRBE is much nicer. So I will call it PNIRBE. It is not made up. The

premise of the PNIRBE, Your Honor, is that there's a feedback loop. If you're a network but don't have enough cardholders, merchants don't take your card. If not enough merchants take your card, then no one wants to be a cardholder and round and round you go. And what emerges is the PNIRBE. We call it the PNIRBE.

Now, perhaps you could call it something else. You can call it whatever the CEO set barrier to entry, but it exists. It's very real. It's a real business reality for the CEO of this company, and there's evidence of it. And it's in the complaint, paragraphs 185 through 187, for example.

And, Your Honor, it strengthens the PNIRBE when you take an independent, vertically integrated credit card company and take -- and then operate it alongside a non-integrated company where you're doing business with Visa and Mastercard at the same time, you're no longer feeling the price effects of having that independent competitor competing with you. You have no incentive from their large interchange collection to lower your own rewards, and thus the price of the credit card, right.

And this is exactly by the way, Your Honor -- this is how prices -- we plead the market definition, I think, using the *Brown Shoe*, the *United States v. Brown*

Shoe factors. And one of the factors is how prices work, and this is how regulators and the credit card companies see profits. It's the net of rewards and interest, right, and fees, and it's accounted for that way.

So when -- this is direct price pressure that's gone once the vertically integrated Discover is now in the possession of Capital One. This allows Capital One to raise interchange fees across the board, and we say that in paragraphs 180 to 189. It will reduce the remittance of those rewards so we have a net price increase.

Paragraph 191, it will discourage new entry, right. Because a new entrant will either have to vertically integrate, just like Discover did to enter, and then be independent and put price pressure on them. Or they'll have to cut a deal with Visa and Mastercard where the market is concentrated well over 45 hundredths, 4503 HHI, which is insane, which is one of the highest HHIs I have ever seen as an antitrust practitioner during my entire career. And I bet you it's the same for them too. 4503.

And Your Honor heard my friend say, well, they're saying concentration went down in that market. Well, it's not really a problem about concentration

increase in that market. It's a slight change. But the very belief -- it's a 4503 HHI. That's almost three times what the DOJ calls highly concentrated.

So the point here is that you're removing a vertically integrated competitor that can put actual price pressure on them by operating them in a non-independent way, right, under Capital One's roof. And that happens in a highly concentrated market where there's just a Visa and Mastercard. They have almost 90 percent of that market.

And, Your Honor, it strengthens barriers to entry because it increases -- it allows Capital One to use the Discover base without actually growing the network itself to compete with Visa and Mastercard. How do we know that's what they're going to do? The CEO said so again. He said, "We're going to keep it very small." It says that in paragraphs 73, 74 of our complaint. I'll get that to the Court in a bit. I wrote it down somewhere.

The point, Your Honor, is we don't have to speculate. We don't have to speculate about what they're going to do. And not once did I hear Ms. Davidoff mention the words of the CEO of the company about their plans. Not offhand remarks. Words stated to their own shareholders about why they're

doing a very expensive, very, very big merger.

And I think you can take them at their word. I don't think that's speculative. And in that sense, I think it raises barriers to entry pretty directly, and we can assume it will.

We also allege, Your Honor -- this is another part of it. Ms. Davidoff said I didn't allege market power. Oh, but I did. Market power is the ability to increase prices without giving up market share. That's the definition.

Now, it's not a percentage cutoff. There is a presumption in the monopolization sense of 30 or 40 percent often being enough for monopoly power, which is a unique kind of market power.

(Reporter clarification.)

MR. BATHAEE: And, Your Honor, that's not the point. There is no magic market share number where you have market power. It's a contextual question, again bringing me back to the point about why this is not a motion to dismiss argument. In the *Vons* case, 7 percent was enough for market monopoly power in fact. I know that was a real outlier. I'm not making that point here. I'm just saying, Your Honor, it's not a market share test.

The question is what do we allege about

prices? We allege the precise mechanism that will then cause a price increase, and we allege that their CEO plans to pursue that mechanism. That, Your Honor, will allow them to increase prices.

Now, if Your Honor doesn't believe me, what about the CFPB? Paragraph 197, the CFPB did a study and said when you're a bank, you actually have a higher ability to raise prices than you normally would. Here's a quote from the CFPB study on paragraph 197: Large credit card issuers charge average fees that are 70 percent higher than those charged by small institutions. Why is that? Market power.

And so in a sense, Your Honor, the ability to raise prices here in a highly concentrated market is the essence of market power, and I think we've alleged it with granularity. We've alleged it with studies. It's not unadorned in the pleading.

And, Your Honor, we say it eliminates Discover, which is the vertically integrated competitor in paragraph 198. It leaves only AmEx, paragraph 199.

What about facilitating horizontal collusion? Yes, we do say that these are recidivists. They do in fact collude Visa and Mastercard and Capital One. In paragraph 200, they do have a history of the government going after them for colluding on interchange fees,

mind you, Your Honor. And every time, what happens is the interchange fees go up when they collude, paragraphs 204 to 205.

And, Your Honor, I do want to make this -- this is pretty brand new because this just happened. But the government sued Visa recently under Section 2 in the Southern District of New York. And paragraph 107 of that complaint alleges this: In 2023, Chase wanted to add Discover's post-networks to the back of its cards. Visa cut a deal with Chase requiring Chase to enter into a debit routing agreement in exchange for a temporary exemption for restriction on using Discover's network.

Now, that's not an exact quote. That's -- I just paraphrased that section. I want to be clear I was paraphrasing that section.

But paragraph 107 in my complaint -- and that's Docket No. 124-cv-07214 in the Southern District New York. If the Court wants us to amend the complaint to put those allegations in there, we can if Your Honor thinks that there's not enough on likely collusion. But here it is. Precisely the kind of collusion we're saying will get much worse after this merger is over. That's because there's only one or two people to collude with, and they have a history of doing it.

And *Twombly* says Your Honor should use common sense. It doesn't say any -- it doesn't say if dismissed cases. That's not the only thing that *Twombly* says. It says common sense applies. And I think, Your Honor, we have a past history of conduct, we have the government coming after one of the defendants for precisely the type of collusion we're alleging, I think it's pretty safe to say that alleges -- and at least alleges at the pleading stage part of the rule of reason claim.

And what about the agreements themselves? Those are not conjecture. They currently exist. No dispute about it. They have agreements right now setting the interchange fees split between Visa and Mastercard on one hand and Capital One's cards on the other. Those contracts currently exist.

Are they legal? I don't know. That's not before the Court. Probably. After the merger, they will not be. Why is that? Why do they magically no longer become legal? Well, one, we have to look at the agreements in conjunction with all the other market effects as part of the rule of reason to find out whether or not, in fact, they harm competition. So under the rule of reason, we don't know if they're legal yet. We'll need evidence and a trial for that.

But what -- what -- and I'll get to why they are *per se* unlawful in a second, but I just want to finish my point on the rule of reason. What do we say about these agreements? The agreements currently exist, paragraph 206. They're going to become horizontally aligned with each other, paragraph 207. And I'll get to the *per se* issue later.

Their CEO and CFO stated that they will continue the agreements unambiguously, paragraph 209. And they're going to maintain the agreements at the same time they're setting the interchange rates for Discover. That's at paragraph 210.

Those are two, three competitors directly competing in the interchange network getting together routinely to set interchange fees. Does it matter which credit card agreement they're talking about? Of course it doesn't. We don't allow competitors to decide prices. That's the hallmark of Section 1.

Now, when Your Honor takes those agreements in conjunction with the other allegations that we just made about market structure, about barriers to entry, you not only have a Section 1 claim, you have a Section 7 claim, both under the rule of reason. They have to be done factually.

Usually a jury will look at it. In this

case, Your Honor will get it. We'll get detailed evidence on the market, on the PNIRBE, on pricing, on the agreements themselves, and what the terms state. How often do they meet? How are they negotiated? How long have they existed? Any entrance? Has anyone failed to enter? These are things that we're going to find out from their documents. We're going to find out from their testimony in a trial.

And it's not appropriate given that we plausibly alleged facts here in the complaint to then throw the case out because of, I think, the notion that you look at market share and magically can tell if a merger is unlawful.

Now, where does that market share language come from? *Steves and Sons* is quoting the *Philadelphia National Bank* presumption of anticompetitive effect. We need not meet a presumption to allege a rule of reason claim. It's an easy way to do it. We don't have that available to us here. I don't think so. At least not in -- not in the interchange market, but we do in the -- you know, there's some increase in concentration in the credit card market.

We didn't change our theory. It just happens to be a 70-something point Herfindahl increase in the credit card market. That's part of the analysis under

the rule of reason.

But are we relying on a *Philadelphia National Bank* presumption to say, look, market share go up, antitrust case illegal? No. And we're not required to. A presumption is not the element of the claim. It's not an element to meet the market share test.

We're not saying it's irrelevant either. And in fact, Your Honor, I tried to explain why you can have exactly the same market shares but no competitive pressure after the merger. Why? Because they now operate the person who is keeping all the interchange fees, and it's that mechanism that allows the competitive pressure to exist.

If you don't -- if you don't have an independent vertically integrated credit card company that's keeping those fees, who is going to put the competitive pressure on you? You could have the exact same market share. It wouldn't make a difference, right. And if you own it, it's not competitive pressure anymore. You wouldn't lower your prices in response.

I do want to -- just to get to the -- unless Your Honor has any questions on the rule of reason points, I can get to the *per se* point very quickly.

THE COURT: All right.

MR. BATHAEE: We address this on pages 26 and 27 of our brief. The Copperweld doctrine would apply immediately, the next day after the merger. Discover today is unambiguously a horizontal competitor in the interchange market with Visa and Mastercard unambiguously, undisputed. Tomorrow it will become the same entity operating as a single economic entity, as a single economic unit, as the standard requires the day after the merger. So under Copperweld, this is the same entity. They're horizontally aligned now. Now, the question is are these contracts now therefore *per se* legal? I think they very well may be.

The response I've gotten is, well, no, it's a dual distribution model. There's no such thing.

After the merger, the CEO has stated that he does not intend to issue Capital One cards through Discover, that all his Capital One cards through Discover. He's going to continue to issue them through Visa and Mastercard, and Discover is going to be vertically integrated. In fact, you heard them say it's going to be vertically integrated.

So what's being dual distributed? Dual distribution, Your Honor, is, as my friend said, when you sell your own product and you sell your competitor's product alongside. That's not what this

is.

In fact, the market -- and then we get the response from the case that it's legal error in a criminal case, *United States v. Brewbaker*, a criminal case. The court said just because you also distribute -- you have a dealership model, and you're directly competing. That doesn't mean your -- it's *per se* unlawful and you must now go to jail for antitrust violations, and the court reversed. That's not this issue.

These are -- these are much more horizontally aligned. We're talking about price and output, and we're talking about two direct horizontal competitors, not some kind of dealership arrangement. You're not distributing -- Visa is not distributing Capital One's cards.

These -- in fact, Your Honor, if you look at the markets, they're not vertically aligned. They're just conjoined by the interchange fees. The interchange fees affect prices in both markets, right. There are two markets alleged. One is the interchange market. Once is the credit card market.

If the interchange fees go up, then there's a feedback loop on the barrier to entry around them. If the interchange fees go up, it affects both markets.

That doesn't make them vertically aligned.

And, Your Honor, you can have anticompetitive effect in two markets simultaneously. In fact, *Apple v. Pepper* makes this point, I think, pretty nicely. It does not mean that now suddenly you're in some kind of vertical chain of distribution.

Now, I don't think this is a question that can be even resolved at this point in the litigation. I think Your Honor made this point in *Lumber Liquidators*. Whether it's rule of reason or *per se* will depend -- and this is a quote from that case -- on a considerable inquiry to market conditions before any evidence justifies a presumption of anticompetitive conduct.

I think that's probably right here. It might require quite a bit of development to see if the contracts themselves are the sort that if they persist past the merger will unambiguously be horizontal agreements on output and price. If it turns out that that's the case, then the *per se* rule would be appropriate.

But I don't think -- I think at a minimum, there's a factual question on that point and not a grounds for, you know, outright dismissal of a potential *per se* claim. I think we have put the

foundation there in the pleadings that they're going to be horizontally aligned and it's about the price and output and that there are two conjoined markets that have anticompetitive effect from those agreements.

So in that sense, Your Honor, I think the *per se* rule at a minimum needs factual development to be decided one way or the other. But, Your Honor, there's enough now to show that there's going to be direct horizontal alignment and the subject of the agreements is gong to be interchange fees in the splits.

THE COURT: All right.

MR. BATHAEE: One last point, Your Honor, on irreparable harm. I find this argument entirely confusing. At the reply at page 19, they say, well, we can go get damages. I don't understand that. There's no damages here. Once this merger goes through, there's no lawsuit. And on top of that, the way we're being harmed, we might even have all of these *Illinois Brick* issues. This is it. This is -- there's only the injunctive relief claim here.

I don't know how we could get damages from the allegations here. Perhaps under Section 1, if there's independent -- an independent violation of Section 1 after the merger, Your Honor, we would probably be free to bring that suit. We didn't hear

one way or the other whether they think so for damages. But that doesn't preclude the injunction here for the merger itself, which has no damages claim available to it.

THE COURT: All right.

MR. BATHAEE: Thank you, Your Honor.

THE COURT: All right. I'm going to take a short recess, and then we'll finish up with counsel's rebuttal. Let's reconvene at 12:35.

(Recess from 12:25 p.m. until 12:35 p.m.)

THE COURT: Counsel, I'll give you the last word on this.

MR. GELFAND: Thank you, Your Honor. I'll try to be brief. And Ms. Davidoff, again, will cover the subject that she had covered.

THE COURT: All right. Well, let me just ask one question that cocounsel may be thinking about, and that is with respect to the motion to dismiss. How does the Court's jurisdiction to conduct a *de novo* review at some point, if the merger goes through, affect the analysis that applies to the motion to dismiss and whether that impact what would otherwise be a traditional *Twombly* analysis for a private civil antitrust case?

MR. GELFAND: Well, maybe Ms. Davidoff will

have additional thoughts on that, but I will tell you that my thought on it is the *de novo* review is no different from any other merger case. When a court is -- when a court has before it a challenge to a merger -- and I've litigated a number of these, and I'll give you an example in a moment -- the plaintiffs do have an opportunity to make their case, allege that the transaction is unlawful, allege that they are harmed by the merger in some specific way.

And I think it has no impact. Those are words that Congress chose in 1966 to indicate that the banking authorities are not going to be binding on the Justice Department.

But, for example, the Supreme Court said in *First National Bank of Houston*, a court can learn from what the agencies do. And, certainly, if the agencies modify the transaction in some way, that becomes a fact that the court has to take into consideration.

But I don't think it has any impact on *Twombly* standards. You still have to come forward and plead with reasonable particularity and non-conclusory factual allegations that you have a cause of action under Section 7. And here, the unusual Section 1 -- the unusual Section 1 claim.

I have to say, I don't remember -- I guess

the *Topgolf* case is an example of a plaintiff in effect alleging something that's going to be independently actionable happening after the merger as a result of the merger. But usually you just bring these cases under Section 7, Your Honor.

And let me give you an example I think might illustrate it for the Court.

First of all, I just want to correct one thing that my colleague on the other side said, which was that I had misspoken by saying that there's never been a premerger challenge. That's not at all what I said. What I said is --

THE COURT: Right.

MR. GELFAND: -- there's never been a challenge by a private litigant allowed to go forward during a regulatory review process. That's the point that's unprecedented here.

THE COURT: Right.

MR. GELFAND: But let me give you an example of one of the cases I've litigated. In 2008-2009, T-Mobile acquired Sprint, two wireless carriers, and the Justice Department did a long investigation of that. The Federal Communications Commission did a long investigation of that. And at the conclusion of those investigations, they settled the matter. They entered

into consent decrees. The consent decrees actually were with the Justice Department, not the FCC. But there was a set of conditions imposed on the merger. And there were some divestitures. There were some other requirements that the company postmerger conduct itself in a certain way.

There were some state AG offices that were not satisfied with that outcome. And they waited until that process was over, and then they brought their own action in front of Judge Marrero in the Southern District of New York. And we litigated it fresh. They were allowed to take discovery at that point. They were allowed to present their arguments about the market, what the merger was going to do. And Judge Marrero denied their request for relief. The merger was completely lawful.

And at that time, private litigants filed an action under Section 7 against the merger. And we were able to resolve that in a matter of weeks because they moved for emergency injunctive relief to prevent the merger from happening. They had been able to watch the proceedings up until then. They were able to take into consideration the remedies that had been obtained from the FCC and the DOJ.

And we had two different emergency hearings,

and the court was able to listen very carefully to all of the arguments. And the motion for a preliminary relief was denied there because there was no claim, just as we think it will be denied here if --

THE COURT: *De novo* review standards?

MR. GELFAND: You know, we don't call it *de novo* review. It's just --

THE COURT: The statute does.

MR. GELFAND: Yeah. The statute just says you have a cause of action under Section 7 if a merger is going to substantially lessen competition. I don't find any significance to the *de novo* --

THE COURT: Label?

MR. GELFAND: It's just a label.

And I think if you look at *First National Bank of Houston*, which analyzes what that phrase means, what *de novo* means, the court there says the same thing. It just means the court makes an independent determination of the facts and apply the law to the facts and then decide does the merger violate Section 7 of the Clayton Act.

THE COURT: Who has the burden in that process?

MR. GELFAND: The plaintiff. The plaintiff has the burden -- the burden is always on the

plaintiff.

THE COURT: That's basically just giving a private plaintiff a cause of action to challenge the merger --

MR. GELFAND: Correct.

THE COURT: -- once consummated.

MR. GELFAND: Yeah. And they have that cause of action under Section 16 of the Clayton Act to bring an injunctive relief motion.

THE COURT: Okay.

MR. GELFAND: And so these premerger challenges happen all the time. It's just that we don't have litigation running in parallel with a regulatory review process that could result in a transaction looking different and maybe even not happening at all.

THE COURT: Right.

MR. GELFAND: My colleague also brought up the airline merger that was recently challenged. He knows that's going to break my heart because I tried that case in front of Judge Young in Boston. And I'm very sorry to say that injunction was granted there. The Justice Department did an excellent job of trying that case.

But this is just illustrative of a flaw in

the plaintiffs' argument, Your Honor. They seem to think that these agencies are just there with a rubber stamp ready to waive these transactions through. If there are serious competitive issues, those get identified by the expert agencies. Here there are two federal expert banking agencies. There is a state agency. And there is one of the two federal agencies that enforces the antitrust laws. Six hundred attorneys in that agency last time I checked, and they are incredibly -- they are just excellent at what they do, Your Honor.

So the idea that this merger could be unlawful and just sail through that process is just simply not correct.

THE COURT: All right.

MR. GELFAND: And so if there are serious antitrust issues, they will be addressed either with the deal getting challenged -- we don't think that's going to happen -- or through some form of commitments that addresses those competitive issues.

And the point of our argument is that until those things happen, until we know what the final deal looks like, the Court is not in a position to analyze the Section 7 issues. That's the learning of the Seventh Circuit decision.

I want to just say one thing.

THE COURT: Well, let me just go back. I thought the term *de novo* was in the statute, and it is. It's in the Bank Holding Company Act.

MR. GELFAND: Correct.

THE COURT: Right. It does say they shall review *de novo*.

MR. GELFAND: Correct. That is a term that Congress chose to use when they wrote that statute.

THE COURT: Right.

MR. GELFAND: And I think what they wanted to say is the court can take a fresh look at the evidence like any other *de novo* review and --

THE COURT: Right. But you're saying that's predicated on the same grounds any civil action would be, and that is they would have to additionally allege a plausible claim of antitrust violation?

MR. GELFAND: Correct, Your Honor.

THE COURT: As opposed to bring me all the evidence that was used to approve the merger, and I'll *de novo* look at it and see if there's a problem?

MR. GELFAND: Correct. This is not a review of an administrative --

THE COURT: An administrative agency, right.

MR. GELFAND: And it's not an APA claim.

THE COURT: Okay.

MR. GELFAND: It also -- this is a side issue at this point. But their request for discovery of the entire administrative record is simply beside the point. They have specific claims that they have alleged in their complaint, and those are not necessarily the same as the things that the agencies look at.

THE COURT: All right.

MR. GELFAND: So the issues that you would review *de novo* or just simply try the same way that every merger case I've ever seen gets tried is you would look at the evidence relating to the theories of harm that they articulate in their complaint.

THE COURT: All right.

MR. GELFAND: If you would indulge me for 30 seconds, Your Honor?

THE COURT: Yes.

MR. GELFAND: Several times my colleague said something to the effect of there's going to be injury, there's going to be higher prices, there's going to be worse rewards for credit cards, and then he --

THE COURT: That would be terrible.

MR. GELFAND: Yeah. And then he juxtaposed that with just read what the CEO said. Just read what

the company said under the securities laws. Very misleading, Your Honor. The statements that this company has made have been truthful. We don't dispute them. There will continue to be a Capital One issuance of Visa and Mastercard, and there will be a Capital One ownership of the Discover network that itself will issue Discover cards. That's all that those statements said. It didn't say we're going to raise prices or diminish rewards.

In fact, this transaction is going to bring enormous benefits to the community, and it's going to be pro-competitive. The idea is that it's going to make Discover, which has languished for years as a 3 percent player in the credit card market, it's going to bring new resources, new capabilities to that struggling credit card, and they are going to become a more effective competitor of Visa and Mastercard as a result of this transaction. That's what the company has said in its public statements.

I apologize for being animated, Your Honor, but I think it's very important to be precise when you say the company has said something.

Now, my colleague also said we didn't read the text of the statute. I'll do that now because I think they make this argument that -- I'm not sure

quite how to respond to it because it's a little bit of a *non sequitur*. They say the statute says any action can be brought; therefore, we can bring it as early as we want. And then they concede, okay, we can't bring it before there's even an agreement.

But the statute says nothing about how early the claim can be brought. It only says the end date on when the claim can be brought. So let's read the statute language, the whole sentence. This is 1828 -- 12 U.S.C. 1828(7)(A): "Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated."

It has to be brought prior to that date when the merger can be consummated, which as a result of the other paragraphs is 15 to 30 days after regulatory approval. That is an end date. And as long as they bring their case -- and I'm quite confident they will have a new stickler on their computer to let them know when the regulatory approval happens -- they can then look at their complaint, see if any of it still matters given whatever the regulators do, and they can bring that case right back to Your Honor's court or to any court that they want to file it in or other claimants

can. They're not the only people allowed to bring a case. And we will deal with the case then.

But as long as they bring it within that window, they can litigate it to a conclusion. They're not -- they're not harmed by not being able to pursue their case.

THE COURT: Well, what is "prior to the earliest time"?

MR. GELFAND: I apologize, Your Honor. I'm a little --

THE COURT: It says it shall be commenced prior to the earliest time.

MR. GELFAND: Correct.

THE COURT REPORTER: Judge, I'm sorry. Could you move the microphone closer to you, please?

THE COURT: Yes. I'm sorry.

THE COURT REPORTER: Thank you.

THE COURT: The statute says prior to the earliest time. I understand what the earliest time at which a merger transaction approved might be consummated, but it's the prior to the earliest time that seems to open it up to an earlier filing.

MR. GELFAND: Well, if you look at everyone who has thought about this statute, most importantly, the Justice Department --

THE COURT: Yeah.

MR. GELFAND: -- it has always been interpreted as meaning you have to file it by that date, prior to that date, but you don't file it before regulatory approval.

So, for example, Your Honor -- we cited this in our reply brief -- the Justice Department -- interesting timing -- recently made an announcement about bank merger guidelines. They used to have guidelines from the 1990s. They recently withdrew those guidelines, and they issued an addendum talking about how they will consider the competitive issues and bank mergers going forward. Fine, that's their prerogative.

Now, in the statement when the Justice Department issued that statement, that new guidance on bank mergers, they explained how the DOJ review process works. And they say, We review for competition problems, and then we issue a report to the agencies. And, we, the Justice Department, also have the ability to file a lawsuit after regulatory approval.

That's what the Justice Department said in describing how they view the process. And one of the points we make in our papers is it's inconceivable that Congress in passing this law in 1966 wanted to make it

easier for plaintiffs to file early than it did for the Justice Department.

The language itself says that the -- it's the earliest date in which a merger transaction approved under paragraph 5 might be consummated. So it's speaking about an approved transaction. And I think that only makes sense, Your Honor, if the action is brought after approval. Otherwise, we don't even know if this mythical prior to date is ever going to exist.

So all indications are that what Congress intended here by prior to was setting an end date -- you have to bring it prior to that date -- but not attempting to say that means you can bring it at some earlier date than under general principles of law would not be a ripe claim for the purposes of Article III.

THE COURT: I understand.

MR. GELFAND: I want to talk for a moment about injury in fact. Your Honor asked a question about that. I do think that plaintiffs here have a very serious problem with injury in fact. We explain this in our brief. I touched on it briefly. But when you're thinking about whether this is a ripe claim, I just would ask the Court to consider all of the layers of speculation that have to be stacked on top of each other. And that is, is the merger even going to be

approved? What will be the conditions under which it's approved? What will be the postmerger conduct that might align with the plaintiffs' theories of harm here?

There's a bit of a Rube Goldberg contraption that's been constructed here. Typically, in a horizontal merger case, like Sprint and T-Mobile, for example, the states who challenged that said, look, there are many customers today who get the benefit of playing T-Mobile and Sprint off of each other. If they see T-Mobile with one price that they don't like, they can go to Sprint and vice versa.

So from day one after the merger, that competition is going to be gone. And most antitrust lawyers and litigators and courts, in my view, would say that's a concrete enough injury to challenge the merger. But here that's not what they're saying. They're saying that because Capital One is going to continue to issue Visa and Mastercard, it's not Visa or Mastercard acquiring Discover. It's Capital One. Because of that, some new set of incentives is going to arise out of that, and then we're going to start taking bribes. That's the theory here, Your Honor.

But if that's true, if we start taking bribes from Visa and Mastercard, who will remain independent competitors after this transaction, that is

independently actionable under Section 1. If it's truly a bribe, probably under other sections too. But it's independently actionable under Section 1 of the Sherman Act.

But we have no idea what form that's going to take. They just say, well, they're probably going to do it, but we can't really tell you exactly how or how we're going to be impacted by it or which prices are going to go up or which rewards are going to go down. Just take it on faith and let us to do a massive amount of discovery, impose a huge cost and burden on these companies while they're going through a regulatory review, and we'll figure it out one day, Your Honor. They even said, "We don't know if they're illegal yet," during argument.

THE COURT: Does that Article III injury in fact issue just conflate with the cognizable antitrust injury requirement?

MR. GELFAND: I think they are very similar. They're very closely aligned. The way we had read their complaint and then their motion papers was that they -- the irreparable injury here, that concrete injury that they're litigating on this motion, is just the inability to bring the action ever. I think that's now fallen by the wayside. I don't really think they

had their heart in it to begin with.

But we have heard during argument something that's not in their papers to my recollection. I apologize if it's there. But now they're saying, well, the closing of the merger itself will cause the injury irrespective of what conduct the parties engage in after that.

And one thing I find very curious, Your Honor, is that my colleague said, well, we'll stay the trial, happy to do that. We just want to take discovery from now until then, and then we won't try the case before the merger gets closed. No, we're not going to do that. We'll just take the discovery so we're prepared to try the case someday post-consummation. And that, I think, is quite revealing about the motives of this litigation, Your Honor.

I will say a couple of other things if I could.

I'm actually done. I am not going to say anything else.

THE COURT: All right.

MR. GELFAND: Thank you very much, Your Honor. We're very grateful for the opportunity to present such a long and detailed argument, and

Ms. Davidoff will now cover a couple of other things.

THE COURT: Yes.

MS. DAVIDOFF: Thank you, Your Honor. I'll be very brief.

I agree completely with Mr. Gelfand that the *de novo* language in the statute does not change the need to require *Twombly*. All it means is that the Court is reviewing this transaction -- reviewing plaintiffs' claims after the transaction closes. That means it's *de novo* not deferring to the agency.

THE COURT: So there's no binding decision?

MS. DAVIDOFF: There's no binding decision, exactly.

The Court does, though, need to apply *Twombly* just like it would with any other private claim. And I heard plaintiffs list a number of sort of catch phrases, point to a number of paragraphs in the complaint where they say we assert prices are going to go up, we assert competition will be reduced. That's exactly what *Twombly* says you can't do when faced with a motion that shows that the -- that the conclusory assertions like that aren't plausible. They aren't backed up by plausible factual allegations.

So, you know, we went through why the complaint doesn't actually plead an increase in

barriers entry-wide, it doesn't actually plead there's going to be a loss of vertically integrated competitors, and it doesn't actually plead that there's a likelihood of increased collusion.

The response of that under *Twombly* can't be, look, our complaint uses those phrases. That's exactly what *Twombly* says is not okay. You need to point to plausible facts.

The last point I want to make, Your Honor, is that there was a pretty dangerous misreading of *Duke Energy* in the argument. *Duke Energy* held that a Section 2 -- it wasn't a Section 2 exclusionary conduct case. And there the campaign of exclusionary conduct was alleged to amount to coordinated, anticompetitive monopolization. And the court held in that circumstance, a Section 2 exclusionary conduct case where the campaign of exclusionary conduct is meant to be one big thing, that conduct has to be considered together in evaluating that one Section 2 claim.

Duke Energy doesn't say -- no case says that when considering antitrust claims, a court is going to aggregate across markets or aggregate across separate antitrust claims. It's just not the case.

So plaintiffs here have a Section 1 claim about contracts between Capital One and Visa and

Mastercard. They have a Section 7 claim about payment networks and a Section 7 claim about credit cards. And, you know, you could just read the language of the Clayton Act and the Sherman Act. They say that plaintiffs have to plead the elements of each based on plausible factual allegations.

Thank you.

THE COURT: All right. Thank you.

Let me first commend all counsel for the quality of your presentations. It's been very helpful. It was my expectation coming into the hearing that after I heard oral argument, I would take the matter under advisement and give you an opinion. There's no doubt that these issues invite extensive judicial exposition.

But I think it's in everybody's interest at this point that the Court rule on this motion. I think they are very substantial issues as to the adequacy of the pleading in terms of *Twombly*. I think there's also substantial issues cutting both ways as to whether the matter should be dismissed.

But what is clear to the Court is that the case should at least be stayed, and the Court is going to do that based principally on the *Michigan National* case and all the other cases that have been decided

since then involving mergers and acquisitions. I'm going to stay the matter in all respects.

To the extent the case needs to progress after regulatory approval, the Court can expeditiously get us to trial fairly quickly. So that will be the ruling of the Court, and the Court will issue an order.

Anything further?

MR. BATHAEE: Your Honor, just so we're not blindsided by the merger, can we get a status report if the thing gets consummated or as it gets closer?

THE COURT: Yes. Let me hear from everybody every 90 days unless something happens sooner definitively.

All right. Very good. Thank you.

The Court will stand in recess.

Time: 1:04 p.m.

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/
Rhonda F. Montgomery, CCR, RPR